Supreme Court, U.S.
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No. 06-___

In the Supreme Court of the United States

M2 SOFTWARE, INC.,
Petitioner,

v.

MADACY ENTERTAINMENT, *et al*,
Respondents

M2 SOFTWARE, INC.,
Petitioner,

v.

M2 COMMUNICATIONS, LLC, *et al*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court should grant certiorari on the narrow but recurring federal question of whether a Judge in a Court of Appeals must reassign a motion alleging an appearance of bias under 28 U.S.C. § 455 to a new impartial Judge or panel, where conflict considerations have made a Judge's reassignment of such motions a statutory requirement under 28 U.S.C. § 144 in the District Courts.

RULE 29.6 STATEMENT

Petitioner is M2 Software, Inc. (hereinafter "M2"). Petitioner has no parent corporation and there is no publicly held company owning 10% or more of Petitioner's stock.

Respondents are M2 Communications, LLC, Gaylord Entertainment, and Jeff Moseley [in *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) (hereinafter *"M2 Communications"*)], and Madacy Entertainment, Handleman Company, and SFX Entertainment (now Clear Channel Entertainment) [in *M2 Software, Inc. v. Madacy Entertainment, et al.* (U.S.C.A. 03-55957) (hereinafter "*Madacy*")].

Pursuant to Supreme Court Rule 12.4, a single Petition for a Writ of Certiorari is submitted for the above actions on the grounds that the Orders sought to be reviewed involve the same court and an identical question.

Other Parties with a Financial Interest in the Outcome of this Proceeding:

Time Warner, Inc.
Warner Music Group
Clear Channel Entertainment
Viacom, Inc.
Viacom International, Inc.
MTV Networks Company

A Petition for a Writ of Mandamus in the present cases has been concurrently filed. A different Petition for a Writ of Certiorari in a related case may be affected by the outcome of this Petition. *M2 Software, Inc. v. M2 Communications, Inc.* (U.S.S.C. 06-515).

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Petitioner M2 Software, Inc. (hereinafter "M2"), requests that this Court issue a Writ of Certiorari to review the narrow but recurring federal question of whether a Judge in a Court of Appeals must reassign a motion alleging an appearance of bias under 28 U.S.C. § 455 to a new impartial Judge or panel.

OPINIONS BELOW

The published Order of the Ninth Circuit in *M2 Software, Inc. v. M2 Communications, et al* (U.S.C.A. 03-56602) is reported at 463 F.3d 868) and reproduced in the Appendix hereto ("App.") at 1a. The published Order of the Ninth Circuit in *M2 Software, Inc. v. Madacy Entertainment, et al* (U.S.C.A. 03-55957) is reported at 463 F.3d 870 and reproduced in the Appendix at 4a. A single Petition is submitted for a Writ of Certiorari in these cases because they concern nearly identical Orders decided by the same panel of judges and raise an identical question for review. *See* Sup. Ct. Rule 12.4.

JURISDICTION

The court of appeals entered its published Orders on August 21, 2006. The court of appeals denied M2 Software's petitions for rehearing *en banc* on October 26, 2006. App. 7a-8a. This Court's jurisdiction is based on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution [App. 13a] provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

See Tumey v. Ohio, 273 U.S. 510, 523, 534 (1927); *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) ("an impartial judge is essential to due process").

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455 [App. 14a] provides, in pertinent part, that a United States judge:

(a) * * * shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) * * * shall also disqualify himself in the following circumstances: * * * *

> 4) he knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding.
>
> 5) He * * *
>
> (i) Is a party to the proceeding * * * *
>
> (iii) Is known * * * to have an interest that could be substantially affected by the outcome of the proceeding.

(c) * * * shall inform himself about his personal * * * financial interests * * *

(d) * * * (4) "financial interest" means ownership of a legal or equitable interest, however small * * *

(e) No * * * judge * * * shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) * * *.

28 U.S.C. § 46(b) [App. 17a] requires an appellate panel of a minimum of three judges:

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges * * *. The United States Courts of Appeals * * * may determine by rule the number of judges, not less than three, who constitute a panel * * *.

28 U.S.C. §144 [App. 19a] provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

STATEMENT OF THE CASE

I. Introduction and Summary

Petitioner seeks a writ of certiorari on the narrow but recurring question of whether recusal motions under 28 U.S.C. § 455 should be assigned to a different judge where an appearance of bias is alleged. A concurrent but independent petition for a writ of mandamus has been filed separately, seeking mandamus of this Court to direct the Ninth Circuit to enforce the nondiscretionary, automatic, and mandatory provisions of 28 U.S.C. § 455.

II. Background of the Case

This matter concerns a motion to recall the mandates, vacate the judgments, and reassign the appeals to a properly constituted panel in two related appeals (*M2 Communications* and *Madacy*) in which it was discovered that The Honorable Harry Pregerson, Court of Appeals Judge in the Ninth Circuit, should have been disqualified as the owner of equity in Time Warner, Inc., a real party in interest with a stake in the subject matter in controversy. The motion was filed on July 7, 2006, just 15 days after Petitioner discovered Judge Pregerson's equity stake in the cases through a *Washington Post* investigation of a judicial conflict in another case.

On August 21, 2006, in a decision noted in front-page coverage by the California legal press,[1] Judge Pregerson and the panel refused Petitioner's request to reassign Petitioner's motion and denied the motion. Judge Beezer filed a specially concurring opinion in which he concurred only as to the denial of recall of mandate, concluding the Court lacked jurisdiction to address whether Judge Pregerson was subject to enforcement of the mandatory recusal statute.

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[1] *See, e.g.*, front pages: *San Francisco Daily Journal*, Aug. 23, 2006, "9th Circuit's Pregerson Denies Stock Holdings Affected Cases"; *The Recorder*, Aug. 23, 2006, "Ninth Circuit Panel Rejects Conflict Call"; *The Recorder*, Jul. 11, 2006, "Conflict Claimed in Pregerson Rulings."

REASONS FOR GRANTING CERTIORARI

The narrow issue presented for certiorari is whether recusal motions under 28 U.S.C. § 455 should be assigned to an impartial judge where an appearance of bias is alleged. *See United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (cert. granted because case "raises questions of importance in the administration of" a large federal statute). Petitioner requested that its motions be assigned to a new impartial panel to avoid a further appearance of bias. When the Ninth Circuit refused, Petitioner lodged a formal objection in both appeals.[2]

When a motion is made to recuse a District Court judge for bias, "such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144. The public policy reasons for this are obvious: "[I]f a Judge is passing upon a question of his or her own recusal, then he or she is creating an appearance of impropriety by that act alone." *People v. T&C Design, Inc.*, 680 N.Y.S.2d 832, 835 (1998). The Ninth Circuit refused Petitioner's seemingly costless request that the motion be determined by a new impartial panel. App. 1a, 4a. No Supreme Court precedent has interpreted 28 U.S.C. § 455 to determine whether a different panel should hear such motions.

Compared to a District Court motion under 28 U.S.C. § 144, it is even more problematic for a Court of Appeals Judge to self-determine a motion for his recusal under 28 U.S.C. § 455 because the statute places strict duties upon the Judge himself. *See* 28 U.S.C. § 455 (placing duty upon Judge to self-disqualify in the enumerated factually-intensive circumstances; placing duty upon Judge to remain informed about his personal financial interests and other disqualifying conflicts); *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*,

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[2] *See Aplnt.'s Reply in Supp. of Motion* (7/31/2006) at 3 n.12 (requesting impartial panel); *Aplnt.'s Objection to Assignment of Recusal Motion to the Same Panel For Whom Recusal Is Sought* (8/17/2006).

343 F.3d 120, 131 (2d Cir. 2003) ("Judges therefore bear the principal burden of compliance with [§ 455(b)(4)]"); *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988) (Judge's "failure to stay informed * * * may well constitute a separate violation of [§ 455(c)]."). A Judge who determines a motion for his own recusal is placed in the extraordinary position of determining whether his own conduct constituted violation of the statute.

The First Circuit has acknowledged the void of settled law on this issue: "Although a trial judge faced with a section 455(a) recusal motion may, in her discretion, leave the motion to a different judge, no reported case or accepted principle of law compels her to do so * * * ." *In re United States*, 158 F.3d 26, 34 (1st Cir. 1998) (citations omitted). The Ninth Circuit allowed Judge Pregerson and the panel to self-determine a motion that asked the Court to find Judge Pregerson in violation of section 455 for participating in, and authoring, decisions in cases in which he held a financial interest. Such a procedure in itself ignores the prohibition against an appearance of bias or impropriety by judges.

CONCLUSION

Accordingly, for the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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